Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-836

RANDOLPH DOUGLAS WOOD, and
ARTHUR ROMUALD DESCHAMPS, III

Petitioners,

vs.

STATE OF IDAHO

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF IDAHO

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CITATIONS

UNITED STATES CONSTITUTION:
Amendment 4
Amendment 14

UNITED STATES STATUTES:
28 USC 1257

Cases:

Aguilar vs. Texas, 378 U.S. 108, 12 L. Ed.2d 723, 84 S.Ct. 1509

Frank Chambers vs. James F. Maroney, 399 U.S. 42, 26 L.Ed.2d. 419, 90 S.Ct. 1975 (1970)

Giordenello vs. United States, 357 U.S. 480, 2 L.Ed.2d 1503, 78 S.Ct. 1245

Leonard vs. State of Oklahoma, 453 P.2d 257 (Okla., 1969)

Nathanson vs. United States, 290 U.S. 41, 78 L.Ed. 159, 54 S. Ct. 11

Spinelli vs. United States, 273 U.S. 410, 21 L.Ed. 637, 89 S.Ct. 584

Whiteley vs. Warden of Wyoming State Pen., _____U.S. _____ 28 L.Ed. 2d 306, 91 S.Ct. _____(1971)

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OPINIONS BELOW

Defendants herein were tried and convicted, by jury verdict, in the District Court of the Third Judicial District of the State of Idaho, in and for the County of Washington, of the crime of possession of a narcotic drug, to-wit: marijuana. There is no opinion from said trial court.

The judgment of conviction was appealed to the Supreme Court of the State of Idaho, which Court affirmed the conviction. The opinion and decision of the Idaho Supreme Court is not officially reported pending this Petition. It is, however, included herein as Appendix B. Said opinion and decision is unofficially reported in Idaho Capital Reports, Volume 18, No. 84 at page 18 ICR 425.

JURISDICTION

The opinion and decision of the Supreme Court of the State of Idaho was filed July 30, 1971.

Said decision, according to Rule 45 of the Supreme Court Rules of Idaho, became final upon the denial of the Petition for Rehearing on September 27, 1971. On October 19, 1971, the Supreme Court of Idaho entered its Order:

> "That the Remittitur in this action is hereby recalled and that the Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for Washington County, return the Remittitur dated September 27, 1971, to this Court, pending a Petition to the United States Supreme Court for Writ of Certiorari."

Jurisdiction is invoked in this cause pursuant to 28 USC 1257.

QUESTIONS PRESENTED

Does sufficient probable cause for issuance of a search warrant and warrant for arrest exist where the

information supplied the Magistrate consists solely of the officer-affiant's statement that he received an All Points Bulletin radio communication describing an automobile with two occupants believed to have marijuana in their possession and that he has picked up two men driving such an automobile?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following Constitutional and Statutory provisions are set forth in Appendix A, infra:

UNITED STATES CONSTITUTION:
Amendment 4
Amendment 14

UNITED STATES STATUTES:
28 USC 1257

STATEMENT OF CASE

Defendants herein were tried and convicted of the crime of possession of a narcotic drug, to-wit: Marijuana, and were sentenced to imprisonment "in the Idaho State Penitentiary for an indeterminate term of not to exceed five years". (Clerk's Tr. p. 41 and p. 43.)

In the fore-noon of May 4, 1968, James R. Johnston, Sheriff of Washington County, Idaho, stopped at his office in the Courthouse to pick up "some equipment". Preliminary Hearing Tr. p. 75, L. 6-8). While he was in the office, an All Points Bulletin was received. The information in the bulletin was conveyed to Sheriff Johnston who understood it to request that the sheriff's

office be on the lookout for "a green Mercury station wagon pulling a U-Haul Trailer, that they were possibly in possession of Narcotics." (P H Tr. p. 75, L. 16-17). The information that was actually hand recorded by Dispatcher Glen Bruce (P H Tr. p. 94, L. 7-8, was as follows:

> "5-4-68 10:46 A. Caldwell S. O. A. P. B. Be on lookout for SUB 24-25 YRS in '61 matlic blue merc. Montana lic 4-7154 pulling U-Haul Trailer Z-39978. Motorcycle in trailer; has lots of mariquana pills in it. 5-4-68."

The actual writing is in evidence and is a part of the file available to this honorable court. On the Bulletin were subsequent notations as follows:

> "1:32 p.m. picked up at Weiser." (P H Tr. p. 93; Tr. p. 59, L. 14-19).

The Sheriff, after having been apprised of the All Points Bulletin, met one of his Deputies, Mike Wadley, who was scheduled to go on patrol shortly. The Sheriff told Deputy Wadley, " . . . in a joking way to do something . . . to pick them up." (P H Tr. p. 108, L. 19-20). The Sheriff explained his lack of concern about the Bulletin in the following manner at the Preliminary Hearing:

> " . . . ; But we get these bulletins all the time, as far as this goes, and one or two an hour. Just in a joking way I told him to pick the vehicle up." (P H Tr. p. 108, L. 20-22).

Deputy Wadley, after his brief discussion of the APB with Sheriff Johnston, left in his patrol car with

another individual, Mr. Ronald Douglas, and they proceeded to go on patrol. Wadley and Douglas drove south of Weiser, Idaho, in the general direction of Caldwell. As they were driving south, they passed a vehicle traveling north and pulling a U-Haul Trailer. Deputy Wadley, recognizing this might be the vehicle which was listed in the All Points Bulletin, turned around and followed it. He followed the vehicle long enough to identify the license number on the U-Haul Trailer as being the one that was listed on the All Points Bulletin. Once the vehicle crossed into Washing County, he stopped it. (P H Tr. p. 140, L. 15-16).

Deputy Wadley and Ronald Douglas got out of the patrol car and began walking toward the car and trailer (P H Tr. p. 11, L. 11-14). Wadley asked to see the driver's license of the driver of the automobile, which was given to him (P H Tr. pp. 18, 65, and 152), and then Deputy Wadley and Mr. Douglas frisked the defendants. (P H Tr. p. 65; P H Tr. p. 152, L. 24-25). Deputy Wadley then asked the defendants if they could search the car (P H Tr. p. 11, L. 16-17); defendants refused to allow the search (P H Tr. p. 12, L. 11-13; Tr. p. 62, L. 14-16).

Deputy Wadley advised the defendants they were suspected of having marijuana in their possession, read them their rights, frisked them, and took their driver's license (Tr. p. 61, L. 12-15). He told them they were being held on an All Points Bulletin (P H Tr. p. 156, L. 18-19 and P H Tr. p. 157, L. 7-10), and instructed them to "follow me" (P H Tr. p. 160, L. 13-15) to the Sheriff's Office. The defendants indicated that they were having motor trouble, and if the car

had to be moved one of them would prefer to drive it. (P H Tr. p. 12, L. 19-21). After a brief discussion, Deputy Wadley and Mr. Douglas suggested to the defendants that one of the defendants drive the car back to town with Deputy Wadley riding with him (so that nothing could be thrown out of the car) (P H Tr. p. 63, L. 12-15) and that the other boy ride in the patrol car, which was to be driven back by Mr. Douglas. It is important to note, at this point, that both the deputy and Mr. Douglas insisted that they had not placed the defendants under arrest and that the defendants could have refused to go with them. (P H Tr. pp. 12, 14, 21 and 27). On the other hand, the Officer's report (P H Tr. p. 17) shows the time of arrest as 11:30 a.m., which is when Deputy Wadley testified that he stopped the defendants on the highway. After the procession reached the Sheriff's Office, the defendants were placed in a small room and "asked" to stay until between 3 and 4 p.m., when they were officially arrested. (P H Tr. p. 22).

For purposes of this Petition, the facts which transpired from the time of the stopping of the two defendants at 11:30 a.m. until their official arrest at around 4 p.m. are most important. After Deputy Wadley "asked" the defendants to follow him to the Sheriff's Office and kept them in the Sheriff's Office until sometime around 4 p.m., certain steps were taken to cloak the already accomplished arrest with legality and to obtain a Search Warrant, which Petitioners contend were illegal and violative of their rights.

By Deputy Wadley's own testimony, he had no reason to stop the defendants except for the All Points

Bulletin. On page 25 of the Transcript of the Preliminary Hearing the following exchange took place between counsel for defendants and Deputy Wadley:

"Q. And if I understand your testimony, the reason that you did not arrest the defendants out on the highway and waited until you had conducted your search was that you didn't feel that you had any probable cause to make the arrest when you stopped them on the highway.

A. No. The reason I stopped them was just to check them out on this bulletin.

MR. KEAST: Would you answer that question specifically.

A. The only cause I had was the bulletin.

Q. In other words, you didn't feel — at that time you did not have probable cause.

A. No, I didn't have no reason to arrest them, no, sir."

As soon as Deputy Wadley and Mr. Douglas had the defendants lodged safely in the Sheriff's Office they contacted Sheriff Johnston. Sheriff Johnston was at home with Deputy Joe Wilson, and they both came immediately down to the Sheriff's Office. (P H Tr. p. 74). Upon his arrival at the Sheriff's office, Sheriff Johnston asked the defendants if they had been advised of their rights (P H Tr. p. 76) and, before talking with them, advised them of their rights. (P H Tr. p.76). The Sheriff asked the defendants if he could search their car; and when they refused (P H Tr. p. 77, L. 3-7), he immediately left with one of the Depu-

ties to obtain a Search Warrant and various other papers. He left the two defendants in his office with two regular deputies and Mr. Douglas (P/H Tr. p. 85).

Sheriff Johnston went immediately to the Prosecuting Attorney and requested that the Prosecuting Attorney prepare the necessary papers to support a Search Warrant and a Warrant for Arrest. The Prosecuting Attorney prepared, for the Sheriff's signature, a Deposition of Facts in Support of Search Warrant and an Affidavit for Search Warrant. The only information or basis for requesting the preparation of the Deposition and Affidavit was the All Points Bulletin. (P H Tr. p. 90, L. 20-23; p. 91, L. 1-8; p. 94, L. 16-17; p. 110, L. 19-25; p. 111, L. 1-18). The Deposition of Facts in Support of Search Warrant reads as follows:

"QUESTION: What is your name, address and occupation?

A. James R. Johnston. I live at Route 1, Weiser, Idaho, and am the Sheriff of Washington County, Idaho.

Q. What reason did you have for the arrest of the above named defendants or either of them?

A. We picked up an All-Points Bulletin by police radio put out by Canyon County Sheriff's Office describing an automobile as a 1961 Mercury Station Wagon, metallic green in color, Montana license #4-7154 and pulling an orange colored U-Haul trailer, 2-wheel, Washington license = Z 39928, and advising that the occupants were believed to have marijuana in their

possession and the occupants of said automobile were described as two male subjects.

Q. Where were these two men picked up?

A. They were traveling north on U. S. Highway 95 approximately five miles south of Weiser, Idaho, and were stopped at 11:30 A.M. by Deputy Sheriff Mike Wadley, May 4, 1968, at which time the suspects were brought to the Sheriff's office at Weiser, Washington County, Idaho, and at which time they locked the automobile and refused to permit the deputy sheriff to search said automobile."

s/ James R. Johnston

Subscribed and sworn to before me this the 4th day of May, 1968.

s/ Don Henderson
Probate Judge

The Affidavit for Search Warrant prepared for the signature of the Sheriff reads as follows:

"STATE OF IDAHO :
County of Washington: ss.

James R. Johnston, being duly sworn, on oath deposes and says that he is the duly elected, qualified and acting Sheriff of Washington County, State of Idaho; that certain personal property, to-wit: Marijuana, is now alleged to be in the possession of said Arthur Romauld Deschamps, III and Randolph Douglas Wood, situate in the automobile belonging to Randolph Douglas Wood, described as a 1961

Mercury Station Wagon, metalic green in color, Montana license #4-7154 and pulling an orange colored U-Haul trailer, 2-wheel with Washington license Z 39928, with the intent thereof to use the same as a means of committing a public offense, to-wit: the offense of having narcotics, to-wit: marijuana, in their possession.

All of which is contrary to the form, force and effect of the statute in such a case made and provided, and against the peace and dignity of the people of the State of Idaho. And this affiant prays a search warrant issue and the above device be brought before a magistrate and disposed of according to law."

s/ James R. Johnston

Subscribed and sworn before men this 4th day of May, 1968.

s/ Don Henderson
Probate Judge

After obtaining the papers from the Prosecuting Attorney's Office, the Sheriff contacted the Probate Judge, who was home since it was a Saturday, and told him he wanted him to issue a Search Warrant and a Warrant for Arrest. The Probate Judge indicated that all of his papers were at the Courthouse and asked the Sheriff if he would take him to the Probate Court at the Courthouse. The Sheriff took the Probate Judge to the Probate Courtroom in the Courthouse and there, in the presence of the Probate Judge, signed the Deposition of Facts in Support of Search Warrant and Affidavit for Search Warrant, set forth above, and re-

quested that the Judge issue, at that time, a Search Warrant and Warrant for Arrest. The Sheriff, in the Preliminary Hearing, testified that Judge Henderson read the papers over and signed them without comment. (P H Tr. p. 95, L. 14-21; p. 99, L. 23-25; p. 100, L. 21-25; p. 101, L. 1-25; p. 102, L. 1-22).

When the trial court heard arguments of counsel on defendants' Motion to Quash the Search Warrant, Motion to Quash the Warrant of Arrest, and Motion to Suppress Evidence, Judge Henderson was placed under oath and examined by both the State and the defense. His testimony can be found on pp. 4-14 of the Transcript of the Trial. Close examination of Judge Henderson's testimony will reveal that, while he says he had some discussion with the Sheriff, he relied strictly on the information given him by the Sheriff and contained in the Deposition and Affidavit. (Tr. p. 11, L. 9-25). Since the Sheriff testified that the sole basis for his obtaining the Search Warrant was the All Points Bulletin (P H Tr. p. 90, L. 20-23; p. 91, L. 1-8; p. 94, L. 16-17; p. 110, L. 19-25; p. 111, L. 1-18), the All Points Bulletin then had to be the sole basis for Judge Henderson's decision to issue the Search Warrant and Warrant for Arrest.

At the Preliminary Hearing, the Sheriff testified that Judge Henderson signed the Warrant for Arrest at the same time he signed the Search Warrant, and left both documents with him. (P H Tr. p. 109, L. 17-25; p. 110, L. 1-25). Judge Henderson testified that the Search Warrant was first issued while he was in his office and later, from his home, after certain items were found as a result of the search, he issued the

Warrant of Arrest. (Tr. p. 7, L. 13-27). The confusion as to when the Warrant of Arrest was issued is further compounded by the fact that Sheriff Johnston at the Preliminary Hearing, after repeated questioning, consistently indicated that once the items were found which were believed to be marijuana, he immediately served a Warrant of Arrest. (P H Tr. p. 79, L. 4-6; p. 109, L. 17-25; p. 110, L. 1-15; p. 170, L. 1-13). In any event, there is no question from the testimony taken, that Judge Henderson relied wholly upon the knowledge of the Sheriff for the issuance of the documents, and that the Sheriff's knowledge was based entirely upon the All Points Bulletin.

Once the Sheriff had obtained the Search Warrant, he took it back to the defendants, who were still being held in the Sheriff's Office, and presented it to Mr. Wood, the driver of the car, and searched the car and trailer. He found a can of substance he thought to be marijuana and he thereupon arrested the defendants and continued the search of the car, eventually finding additional substances, which, over objection, were admitted in evidence at the trial as marijuana.

ARGUMENT

By its opinion and decision (Appendix B) the Idaho Supreme Court has effectively held that a search conducted at the stationhouse more than four hours after the actual arrest is nevertheless lawful, where a search warrant is issued based upon testimony that 1) the affiant-officer received an APB describing an automobile with two occupants believed to be in possession of

marijuana, and 2) that the affiant had "picked up" the two men.

Petitioners contend such a holding is contrary to applicable decisions of this court cited herein, particularly *Spinelli vs. United States*, 273 U.S. 410, 21 L. ed. 637, 89 S.Ct. 584.

Obviously, the tardy stationhouse search cannot be considered as "incident" to the warrantless arrest; and consequently, the question of whether the APB was actually founded upon probable cause so as to justify a warrantless arrest and incidental search becomes irrelevant. As a result, the search warrant and subsequent search must stand independently the test of "probable cause".

Unlike the factual situation presented in *Frank Chambers vs. James F. Maroney*, 399 U.S. 42, 26 L. Ed.2d. 419, 90 S.Ct. 1975 (1970), this was not a warrantless search which can be justified upon the same "probable cause" existing for the warrantless arrest. This court's opinion in *Chambers* does not purport to answer the question herein, namely the legality of a subsequent search *pursuant to warrant* where inadequate and insufficient *sworn* information is presented to the issuing Magistrate.

The original informant was completely "unknown and unidentified" to the issuing Magistrate—Henderson, as well as the Sheriff. The Affidavit for Search Warrant and Deposition of Facts in Support of Search Warrant, both submitted by the Sheriff (who was not the actual arresting officer), essentially conveyed to the Magistrate the information that:

1. A radio message had been received alleging that a certain automobile contained marijuana, and

2. That the Sheriff had "picked up" two men traveling north in an automobile fitting the description given in the radio message.

In *Aguilar vs. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509, this Court stated:

> "In Nathanson v United States, 290 U.S. 41, 78 L.ed. 159, 54 S.Ct. 11, a warrant was issued upon the sworn allegation that the affiant 'has cause to suspect and does believe' that certain merchandise was in a specified location. Id., at 44, 78 L.ed. at 160. The Court, noting that the affidavit 'went upon a mere affirmation of suspicion and belief *without any statement of adequate supporting facts*,' id., at 46, 78 L.ed. at 161 (emphasis added), announced the following rule:
>
> " 'Under the Fourth Amendment, an officer may not properly issue a warrant to search . . . unless he can find probable cause therefor from *facts or circumstances* presented to him under oath or affirmation. Mere affirmance of belief or suspicion is not enough.' Id., at 47, 78 L.ed. at 162. (Emphasis added.)"

There are absolutely no facts recited in the Sheriff's Affidavit upon which his belief was founded and mere belief or suspicion is not enough. In the case of *Whiteley vs. Warden of Wyoming State Penitentiary*, ___ U.S. ___, 28 L. Ed.2d 306, 91 S.Ct. 1031 (1971), this Court held as follows:

"The decisions of this Court concerning Fourth Amendment probable cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgement that probable cause exists for the warrant. (citing cases) . . . That complaint consists of nothing more than the complaintant's conclusion that the individuals named therein prepetrated the offense described in the complaint. The actual basis for Sheriff Ogburn's conclusion was an informer's tip, but that fact, as well as every other operative fact, is omitted from the complaint. Under the cases just cited, that document alone could not support the independent judgment of a disinterested magistrate."

In *Spinelli vs. United States*, supra, there is a discussion of what information must be brought before a magistrate:

"What is missing in Nathanson and like cases is a statement of the basis for the affiant's believing the facts contained in the affidavit—the good 'cause' which the officer in Nathanson said he had. If an officer swears that there is gambling equipment at a certain address, the possibilities are (1) that he has seen the equipment; (2) that he has observed or perceived facts from which the presence of the equipment may reasonably be inferred; and (3) that he has obtained the information from someone else. If (1) is true, the affidavit is good. But in (2) the affidavit is insufficient unless the perceived facts are given, for it is the magistrate, not the officer,

who is to judge the existence of probable cause. (citing cases) *With respect to* (3), *where the officer's information is hearsay, no warrant should issue absent good cause for crediting that hiresay.* Because an affidavit asserting, without more, the location of gambling equipment at a particular address does not claim personal observation of any of the facts by the officer, and *because of the likelihood that the information came from an unidentified third party, affidavits of this type are unacceptable.* (emphasis added).

"Neither should the warrant issue if the officer states that there is gambling equipment in a particular apartment and that his information comes from an informant, named or unnamed, since the honesty of the informant and the basis for his report are unknown. Nor would the missing elements be completely supplied by the officer's oath that the informant has often furnished reliable information in the past. This attests to the honesty of the informant, but Aguilar v Texas, supra, requires something more—did the information come from observation, or did the informant in turn receive it from another? Absent additional facts for believing the informant's report, his assertion stands no better than the oath of the officer to the same effect. Indeed, if the affidavit of an officer, known by the magistrate to be honest and experienced, stating that gambling equipment is located in a certain building is unacceptable, it would be quixotic if a similar statement from an honest informant were found to furnish probable cause. A strong argument can be made that both should be acceptable under the Fourth Amend-

ment, but under our cases neither is. The past reliability of the informant can no more furnish probable cause for believing his current report than can previous experience with the officer himself.

"If the affidavit rests on hearsay—an informant's report—what is necessary under Aguilar is one of two things: the informant must declare either (1) that he has himself seen or perceived the fact or facts asserted; or (2) that his information is hearsay, but there is good reason for believing it—perhaps one of the usual grounds for crediting hearsay information. The first presents few problems: since the report, although hearsay, purports to be firsthand observation, remaining doubt centers on the honesty of the informant, and that worry is dissipated by the officer's previous experience with the informant. The other basis for accepting the informant's report is more complicated. But if, for example, the informer's hearsay comes from one of the actors in the crime in the nature of admission against interest, the affidavit giving this information should be held sufficient."

Contrary to the implication of the Idaho Court, Petitioners contend the *Whitely* case does not hold that an APB is ipso facto sufficient probable cause before a Magistrate:

"We do not, of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are

entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest."

In this case, no source information of any type was offered to the magistrate who issued the warrants by the officer requesting aid in the all points bulletin. The All Points Bulletin was issued without any information having been given to a magistrate. The issuing magistrate did not receive any information concerning this purported crime until after the All Points Bulletin was issued and arrest had been made. In this case, obviously, the officers requesting the aid had not given sufficient assessment of probable cause prior to the issuance of the All Points Bulletin. The only judicial assessment of probable cause came after the issuance of the All Points Bulletin.

We would respectfully submit that the Idaho decision in this matter is contrary to the *Spinelli* case and constitutes a misinterpretation of the *Whiteley* holding of this court and should therefore be reviewed.

WHEREFORE, Petitioners pray for issuance of a Writ of Certiorari to the Supreme Court of the State of Idaho.

DATED this 20th day of December, 1971.

Respectfully submitted

KIDWELL, McKEE, QUANE & HARWOOD

By
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Boise, Idaho 83701
Attorneys for Petitioners

I herein certify that on the _____ day of December, 1971, I served three true and correct copies of the foregoing Petition for Writ of Certiorari by mail, postage prepaid, on the Attorney General of the State of Idaho and the Prosecuting Attorney of Washington County, State of Idaho.

_____

Wayne L. Kidwell

APPENDIX A

United States Constitution, Amendment Four:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated and no warrants shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and persons or things to be seized."

United States Constitution, Amendment Fourteen:

"Section . (CITIZENSHIP DUE PROCESS OF LAW — EQUAL PROTECTION.) — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Statute, 28 USC 1257:

"STATE COURTS" APPEAL; CERTIORARI.

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the grounds of this being trepugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

APPENDIX B

IN THE SUPREME COURT OF THE
STATE OF IDAHO
No. 10849

STATE OF IDAHO,
Plaintiff-Respondent,
v.
ARTHUR ROMUALD DESCHAMPS, III
and RANDOLPH DOUGLAS WOOD,
Defendants-Appellants.

Boise, May Term, 1971
Filed, July 30, 1971
R. H. Young, Clerk

Appeal from the District Court of the Third Judicial District of the State of Idaho, Washington County. The Honorable Edward J. Lodge, District Judge.

Appealed from judgment of conviction of possession of marijuana, *affirmed.*

Wayne L. Kidwell and Walter H. Bithell, Boise, for appellant Arthur Romuald Deschamps, III; and Ryan & Sweet, Weiser, and Anthony F. Keast, Missoula, Montana, for appellant Randolph Douglas Wood.

W. Anthony Park, Attorney General, Martin R. Ward, Deputy Attorney General, and Charles P. Brumback, Assistant Attorney General, State of Idaho, Boise, and Frank H. Joseph, Prosecuting Attorney for Washington County, Weiser, for respondent.

SPEAR, J.

On May 4, 1968, the sheriff's office in Washington County received an all points bulletin (APB) which provided the license number and description of a vehicle suspected of transporting marijuana and other narcotics. Having been apprised of the APB, Deputy Wadley went on patrol accompanied by Ronald Douglas. The deputy observed the suspect vehicle and stopped it at approximately 11:30 a.m.

Appellants were the occupants of this automobile. Deputy Wadley advised them that they were suspected of possessing marijuana, read them their rights, and frisked them. The deputy then requested appellants' permission to search the automobile which they refused. Wadley informed them that they were being detained.

Appellants were then taken to the sheriff's office, with Douglas driving appellants' vehicle. After Deputy Wadley and appellants arrived at the sheriff's office, the sheriff requested the prosecuting attorney to prepare the necessary papers to support the issuance of a search warrant and a warrant of arrest.

These papers were presented to the probate judge who issued a search warrant and, later, a warrant of arrest. Appellants assert that the information contained in the unsupported APB was the only evidence presented to the probate judge to establish probable cause, and that it was insufficient primarily because it was based on hearsay. The State, however, contends that the information initiating the APB was supplied by a hitch-hiker given a ride by appellant, and this was also divulged to the probate judge.

At trial, appellants asserted the illegality of the arrest and search, but the district court denied various motions based upon these objections. Upon a jury trial appellants were convicted of possession of marijuana. Judgment of conviction was entered on the verdict and each was sentenced to an indeterminate term not to exceed five years in the Idaho State Penitentiary.

On appeal, appellants continue these objections through assignments of error, all on the basis that the APB received by the Washington County sheriff's office does not provide probable cause for their arrest or the issuance of a search warrant. It is our conclusion that an official police communication does provide probable cause for either purpose so long as the communication itself is based upon sufficient information to constitute probable cause.

Respondent cites several recent cases in which courts have found that a police communication will satisfy the constitutional probable cause requirement if it was issued with probable cause. These cases are: United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); Coleman v. United States, 420 F2d 616 (D.C. Cir. 1969); Ojeda v. Superior Court, In and For County of Monterey, 91 Cal. Rep. 145, 12 Cal. App. 3d 909 (1970). In the case at bar the information which precipitated the issuance of the APB was supplied by a known and identified informant who had personally seen the marijuana in the possession of the appellants. This provided a valid basis to issue the APB and established probable cause for the subsequent arrest and issuance of the search warrant.

Appellants cite Whiteley v. Warden, Wyoming State Penitentiary, ——U. S. ———, 91 S. Ct. 1031, 28 L. Ed. 2d 306 (1971), as supporting their contention that an APB cannot supply probable cause for a warrantless arrest unless the arresting officer knows the facts causing its issuance. We cannot agree that *Whitley* can be so interpreted. That case concerned a situation where the Court found the information supporting the communication had been supplied by an undisclosed informant, that it was inadequate and that the ensuing arrest on the strength of such communication was without probable cause. However the Court also stated:

> "We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest." ——— U. S. at ———.

Therefore, the United States Supreme Court has not disturbed those decisions which hold that there is probable cause for a warrantless arrest on the basis of an official police communication supported by information itself reliable enough to supply probable cause. Furthermore the conclusion to be reached from the above

quoted language is that the Court has specifically sanctioned such procedure.

Since the APB provided probable cause for the warrantless arrest, we find that there was also probable cause for the issuance by the probate judge of the search warrant and subsequent warrant of arrest. At the pretrial conference Probate Judge Henderson testified:

> Q. Well, I will withdraw that question. Will you tell the Court, if you will, the whole extent of the conversation that the sheriff revealed to you as to any facts prior that he revealed to you concerning this thing in the all points bulletin, any information he gave you?
>
> "A. The position of the marijuana was mentioned and that the hitchhiker had told whoever had the all points bulletin put out, had told those people that there was marijuana in possession and that the hitchhiker himself had a marijuana with him and was possibly in his shirt pocket, if I remember correctly, and he had a pill in his shoe. Those two things struck me as odd."

Not only did the probate judge have the information in the APB before him, which, we feel would have been sufficient, but he was also informed of the source of the communication.

Judgment of the district court affirmed.

McQUADE, C. J. McFADDEN, DONALDSON and SHEPARD, JJ., concur.

APPENDIX C

In the Supreme Court of the State of Idaho

STATE OF IDAHO
Plaintiff-Respondent,
v.
ARTHUR ROMUALD DESCHAMPS, III,
and RANDOLPH DOUGLAS WOOD,
Defendants-Appellants.

Justice Spear announced the decision in this cause July 30, 1971, and on denial of Petition for Rehearing, September 27, 1971, to the effect that the judgment of the District Court of the Third Judicial District of the State of Idaho, Washington County, is affirmed.

IT IS NOW THEREFORE SO ORDERED.

I, R. H. Young, Clerk of the Supreme Court of the State of Idaho, do hereby certify that the above is a true and correct copy of the judgment entered in the above entitled cause September 27, 1971, and now of record in my office.

WITNESS My hand and the seal of this Court, September 27, 1971.

R. H. YOUNG, Clerk
By Ruth A. Williams, Deputy

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 8 1972
E. ROBERT SEAVER, CLERK

IN THE SUPREME COURT

of the

UNITED STATES

October Term, 1971

No. 71-836

ARTHUR ROMUALD DESCHAMPS, III

and

RANDOLPH DOUGLAS WOOD

Petitioners

v.

STATE OF IDAHO

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OR CERTIORARI

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ARTHUR ROMUALD DESCHAMPS, III
and
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Petitioners

v.

STATE OF IDAHO

Respondent

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OR CERTIORARI

Respondent, STATE OF IDAHO, respectfully requests that the Petition for Writ of Certiorari in the above entitled matter be denied.

REASONS FOR DENYING THE WRIT

I.

In this case the Petitioners raise the

question as to whether or not sufficient probable cause for the issuance of a search warrant and warrants for arrest exist where the information supplied to the Magistrate consists solely of the officer-affiant's statement that he received an All Points Bulletin (APB) radio communication describing an automobile with two occupants believed to have marijuana in their possession and that he has picked up two men driving such an automobile. The reason Respondent requests that the Petition for Writ of Certiorari be denied is simply that probable cause existed and justified the actual arrest of the Petitioners upon the highway and also the subsequent issuance of a search warrant and warrant of arrest.

The Petitioners' rendition of the facts in this case begins somewhat belatedly. Petitioners begin with the receipt of an All Points Bulletin which led to the arrest of the Petitioners herein. However, some very significant instances occurred prior to the issuance of the All Points Bulletin in this case.

The complaining witness, Ben Blinn, was a hitchhike rider in the car driven by the Petitioners. Mr. Blinn testified at lenth to the incidents which occurred while he was riding as a hitchhiker in Petitioners' automobile. Upon terminating his ride with the Petitioners Mr. Blinn testified that he immediately pro-

ceeded to a telephone to contact the local police department and subsequently the Canyon County Sheriff's Department. Immediately thereafter Mr. Blinn testified that several Sheriff's cars arrived on the scene. It was at this time that Mr. Blinn conveyed the information that Petitioners were in possession of marijuana and other drugs and that he delivered to the authorities samples of the marijuana which he managed to conceal while riding with Petitioners. Mr. Blinn also gave a description of the Petitioners and of the vehicle which they were driving, (Transcript page 34, beginning at line 20):

> "A .I gave the substance, which I believed to be marijuana, to the officers and said that these men offered me marijuana and other drugs.
>
> Q Did you give them a description of the occupants of the automobile?
>
> A I gave them a description of the individuals in the automobile, the license number of the vehicle, the description of the vehicle, the color of the vehicle and the location of where I believed the drugs would be in the vehicles.
>
> Q You gave that to the police officers?
>
> A I gave that to the Sheriff."

As a result of this conversation with Mr. Blinn, Deputy Sheriff Dean Edwards testified, at page 41 of the Transcript, beginning at line 19, that he instructed his dispatcher and the Sheriff's Office at Caldwell, Idaho, to put out a broadcast on the police radio transmitting the information provided by Ben Blinn. The dispatcher, Russell Gibbin, testified at page 46 of the Transcript, beginning at line 29, through page 47, line 24, as to the contents of the All Points Bulletin which he put out over the air:

> "A At ten-fortyone a.m. I put out an all points bulletin to be on the watchout for a metallic green colored 1961 Mercury station wagon with a Montana license, pulling a trailer, U-Haul trailer with a motorcycle in it. The trailer had Washington license on it and there was two young fellows in the car.
>
> Q Did it contain any other things as to what you suspected or anything? What was in the bulletin?
>
> MR. RYAN: He is leading the witness. The witness has already answered the question as to what he put out and we would object.
>
> MR. JOSEPH: I want a complete report I was not leading the witness.
>
> THE COURT: I am going to permit the witness his testimony as to what he

put out if he recalls what he put out. However, I am admonishing the Jury at the same time that you are not to be considering this for the truth of the matter at this point. He is testifying as to what he did. You may answer if you put out anything else.

A I did, Your Honor. After describing the car and the trailer it was put out that there were two young fellows in it and that a hitchhiker talked to our Chief Deputy and he had been offered marijuana and some kind of pills and that this car was headed north on Highway 95 at this time."

At page 52 of the Transcript, beginning at line 16, the dispatcher's testimony as to the contents of the All Points Bulletin was stricken by the Court as not being the best evidence available to the State necessary to prove the contents of the bulletin However, the All Points Bulletin was admitted into evidence as State's Exhibit "1" at page 59 of the Transcript, line 4.

In the present case, the Respondent STATE OF IDAHO does not rely solely upon the APB broadcast over the police radio, for it is evident from the record that the subject matter from the APB was testified to directly by the complaining witness, Ben

Klinn, the informant. It was further testified to by Deputy Sheriff Edwards, further testimony, though not as to the subject matter of the All Points Bulletin, was received by the dispatcher himself, Russell Gibbin, all of whom are subject to cross examination by Petitioners' counsel.

An awareness of the foregoing facts which occurred prior to where Petitioners' statement of the case begins is extremely important to any determination in this case for the reason that a police communication will satisfy the constitutional probable cause requirement if it was issued with probable cause. United States v. Ayers, 426 F2d 524 (2d Cir. 1970), Coleman v. United States, 420 F2d 616 (D.C.Cir. 1969), Ojeda v. Superior Court, In and For County Monterey, 91 Cal.Rptr. 145, 12 Cal.App.3d 909 (1970). In the present case, the information which precipitated the issuance of the All Points Bulletin was supplied by a known and identified informant who had personally seen the marijuana in the possession of the Petitioners and who had given samples of this substance to the authorities prior to the initiation of the APB.

The Respondent, STATE OF IDAHO, contends that at the time the Petitioners were stopped and detained upon the highway, there was in fact a legal arrest, State v. Loyd, 92 Idaho 20, 435 P.2d 797 (1967); and

based on the previously recited facts, probable cause existed to justify the legality of police conduct at this point in time.

Petitioners contend that the case of Whiteley v. Warden, Wyoming State Penitentiary, ____ U.S. ___, 28 L.Ed.2d 306, 91 S.Ct. 1031 (1971), does not hold that an APB is ipso facto sufficient probable cause before a magistrate. With this the Respondent, STATE OF IDAHO, necessarily agrees. The Whiteley case, supra, concerned a situation where the court found the information supporting the communication had been supplied by an undisclosed informant, that it was inadequate, and that the ensuing arrest on the strength of such communication was without probable cause. However, the court also stated:

> "We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer

to rely on fellow officers to make the arrest." Whiteley v. Warden, Wyoming State Penitentiary ___ U.S. ___, 28 L.Ed.2d 306, 91 S.Ct.1031 (1971).

In essence, then the Respondent contends in justifying police conduct based upon an All Points Bulletin there must be a retrospective justification therefor and finding of probable cause. In Petitioners' case, contrary to the Whiteley case, supra, the informant was known and disclosed to the involved authorities. This informant not only saw the controlled substance in the possession of the Petitioners, but he also related the possible location of the controlled substance and he rendered up to authorities samples of this controlled substance, all prior to the issuance of the All Points Bulletin. Respondent STATE OF IDAHO would therefore suggest that it is not so much the APB itself which provides the probable cause to justify police procedure in this case, but the facts themselves which gave rise to the All Points Bulletin which manifests the probable cause and justified the police conduct.

Indeed, the Idaho Supreme Court recognized this supposition in its decision rendered in Petitioners' case

"...It is our conclusion that an official police communication does provide probable cause for either purpose so long as the communication itself is based upon sufficient information to constitute probable cause.

"Respondent cites several recent cases in which courts have found that a police communication will satisfy the constitutional probable cause requirement if it was issued with probable cause. These cases are: United States v. Ayers, 426 F.2d 524 (2d Cir. 1970); Coleman v. United States, 420 F.2d 616 (D.C.Cir. 1969); Ojeda v. Superior Court, In and For County of Monterey, 91 Cal.Rep. 145, 12 Cal.App.3d 909 (1970). In the case at bar the information which precipitated the issuance of the APB was supplied by a known and identified informant who had personally seen the marijuana in the possession of the appellants. This provided a valid basis to issue the APB and established probable cause for the subsequent arrest and issuance of the search warrant.

"Appellants cite Whiteley v. Warden, Wyoming State Penitentiary, ___ U.S. ___, 91 S.Ct.1031, 28 L.Ed. 2d 306 (1971), as supporting their contention that an APB cannot supply probable cause for a warrantless arrest unless the arresting officer knows the facts causing its issuance. We cannot agree

that Whiteley can be so interpreted. That case concerned a situation where the court found the information supporting the communication had been supplied by an undisclosed informant, that it was inadequate and that the ensuing arrest on the strength of such communication was without probable cause. However, the court also stated:

> 'We do not of course question that the Laramie police were entitled to act on the strength of the radio bulletin. Certainly police officers called upon to aid other officers in executing arrest warrants are entitled to assume that the officers requesting aid offered the magistrate the information requisite to support an independent judicial assessment of probable cause. Where, however, the contrary turns out to be true, an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest.' ____ U.S., at ____.

"Therefore, the United States Supreme Court has not disturbed those decisions which hold that there is probable cause for a warrantless arrest on the basis of an official police communication supported by information itself reliable enough to supply probable cause. Furthermore the conclusion to be reached from the above

quoted language is that the Court has specifically sanctioned such procedure." State v. Deschamps, et al, Idaho Supreme Court Opinions, Vol. 18, No. 84 (decided May Term, 1971).

Petitioners particularly question whether or not probable cause for the issuance of a search warrant and warrant for arrest exist where the information supplied the magistrate consists solely of the officer-affiant's statement that he received an All Points Bulletin radio communication describing an automobile with two occupants believed to have marijuana in their possession and that he has picked up two men driving such an automobile. In that regard the Supreme Court of the State of Idaho made the following comment:

> "...Appellants assert that the information contained in the unsupported APB was the only evidence presented to the probate judge to establish probable cause and that it was insufficient primarily because it was based on hearsay. The State however, contends that the information initiating the APB was supplied by a hitch-hiker given a ride by apellant, and this was also divulged to the probate judge.
>
> * * *
>
> "Since the APB provided probable cause for the warrantless arrest we find that

there was also probable cause for the issuance by the probate judge of the search warrant and subsequent warrant of arrest. At the pretrial conference Probate Judge Henderson testified:

> 'Q. Well I will withdraw that question: Will you tell The Court, if you will, the whole extent of the conversation that the sheriff revealed to you as to any facts prior that he revealed to you concerning this thing in the all points bulletin, any information he gave you?
>
> 'A. The position of the marijuana was mentioned and that the hitchhiker had told those people that there was marijuana in possession and that the hitchhiker himself had a marijuana with him and was possibly in his shirt pocket, if I remember correctly, and he had a pill in his shoe. Those two things struck me as odd.'

"Not only did the probate judge have the information in the APB before him, which we feel would have been sufficient, but he was also informed of the source of the communication." State v. Deschamps, et al, Idaho Supreme Court Opinions, Vol. 18, No. 84 (May Term, 1971).

What information, then, was provided Judge Henderson, enabling him to find the necessary probable cause to issue the search warrant and warrant

of arrest? Judge Henderson testified, beginning at page 4 of the Transcript, that prior to issuing the search warrant he obtained a deposition of facts to support the warrant and an affidavit from the Sheriff of Washington County, and that he discussed at some length the APB containing the information about the suspects, the Petitioners herein, and the fact that the information contained in the APB came from Ben Blinn, the informant hitchhiker. Based on the information contained in the APB, the deposition of facts and the clarifying discussion with the Sheriff to the effect that the informant had taken marijuana from the Petitioners and given it to the Sheriff (Tr. p. 12, L.16), Judge Henderson issued the warrants. Respondent STATE OF IDAHO does not deny that the information supplied by the hitchhiker informant, Ben Blinn, was not contained in the affidavit or deposition of facts in support of the search warrant, as required by Aguilar v. Texas, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509. This, however, in the Respondent's opinion, is not fatal to the State of Idaho's case against the Petitioners. Respondent has previously argued the legality of the probable cause arrest which took place when the Petitioners were stopped on the highway. In brief and in oral argument before the Honorable Supreme Court of the State of Idaho,

Respondent contended that the arrest of Petitioners was a legal arrest and justified apart from the subsequent arrest warrant. Respondent's contention remains the same before this Honorable Court; that is to say, regardless of any defectiveness in the arrest warrant, the initial confrontation between the police and the Petitioners upon the highway was based upon an All Points Bulletin founded upon probable cause and legal in all respects.

In regard to the subsequent search warrant which was issued in Petitioners' case, Respondent feels that it, too, was founded upon probable cause. It is Respondent's contention that the police would have been justified, because they had probable cause, in making a warrantless search of the Petitioners' automobile at the time of arrest. Chambers v. Maroney, 399 U.S. 42; 26 L.Ed 2d 419, 90 S.Ct. 1975 (1970). It is Respondent's further contention that by obtaining a subsequent search warrant from Judge Henderson, the officers adhered to and provided every possible constitutional safeguard available to the Petitioners.

The information contained in the Affidavit and deposition of facts was sufficient to support an independent judicial assessment of probable cause. In addition, however, the Judge was informed of the nature and source of this communique.

Respondent lastly contends that in accordance with the decision of the Honorable Supreme Court of the State of Idaho, since the APB provided probable cause for the warrantless arrest upon the highway, there was also probable cause for the issuance of the subsequent search warrant. Respondent is aware that the Whiteley case, supra, speaks to the independent judicial assessment of probable cause and issuance of a warrant of arrest prior to the initiation of an All Points Bulletin. Respondent is also aware that in the Petitioners' case no such judicial assessment had been made or warrant of arrest issued prior to the initiation of the APB. However, the Respondent contends that though this information was not communicated to a magistrate prior to the issuance of the APB, the information supporting the APB did give rise to probable cause and that this probable cause sustained throughout the facts of this case the legality of the police conduct.

WHEREFORE, Respondent STATE OF IDAHO respectfully prays that the Petition for Writ of Certiorari before this Honorable Court be denied.

DATED This 6th day of March, 1972.

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WHEREFORE, Respondent STATE OF IDAHO respectfully prays that the Petition for Writ of Certiorari before this Honorable Court be denied.

DATED This 6th day of March, 1972.

Respectfully submitted,

W. Anthony Park

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY That I have on this 6th day of March, 1972, served the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI by placing true and correct copies thereof in the United States mail, postage prepaid, addressed to:

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